NGV Tech Sdn Bhd (appointed reciever and manager) (in liquidation) & Anor v Kerajaan Malaysia

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(NCC)(A)-299–09 OF 2015
ALIZATUL KHAIR, NALLINI PATHMANATHAN AND ZABARIAH MOHD JJCA
7 DECEMBER 2016

Sale of Goods — Sale by description — Sale of future goods by description — Time when title in goods passed from seller to buyer — Whether answer found in s 23 of the Sale of Goods Act 1957 — Buyer ordered purchase of two custom-built ships, closely monitored their construction and paid progress payments according to stages of construction — Seller wound up before vessels were completed — Whether ownership of vessels remained with seller as vessels were not 'in a deliverable state' to be 'unconditionally appropriated to the contract' — Whether title did not pass progressively to buyer in accordance with progress payments — Whether title only passed when mode of delivery and acceptance of vessels as provided for in the contract had been complied with

The respondent entered into a contract with the first appellant ('NGV Tech') shipbuilders to buy two custom-made training vessels for the Royal Malaysian Navy. The respondent closely monitored the construction of the vessels and paid progress payments according to the various stages of completion of construction. To finance its business, NGV Tech had taken loans from the second appellant ('Maybank'). As security for those loans, NGV Tech had created fixed and floating charges over all its assets in favour of Maybank under several debentures. The floating charges crystallised when a winding up petition was presented against NGV Tech. Maybank appointed a receiver and manager for NGV Tech under the debentures and was prepared to continue funding the completion of the two vessels if the respondent made certain concessions. However, since there was no response from the respondent, all work on the vessels came to a halt. NGV Tech was eventually wound up whereupon the respondent terminated its contract with the company at which point the respondent had already paid RM249.9m in progress payments out of the total contract sum of RM294m. When the respondent sought to transfer one of the two vessels ('Teguh Samudera') from NGV Tech's shipyard to its premises for safekeeping, Maybank objected to the move saying NGV Tech still owned the two vessels subject to Maybank's fixed charge over them. The deadlock in the dispute over the issue between the parties led to the appellants filing an originating summons ('OS') in the High Court for an order that NGV Tech was still the rightful owner of the two vessels; that at all material times the

vessels were charged to Maybank and that Maybank and/or the receiver and manager of NGV Tech had the right to deal with and/or dispose of the vessels. The appellants maintained that the respondent's only recourse was to sue NGV Tech for damages as an unsecured creditor. The respondent, on the other hand, argued that property and title in the vessels passed to it progressively in accordance with the progress payments it had made towards their construction. Relying upon s 19(1) of the Sale of Goods Act 1957 ('the SOGA'), the High Court dismissed the OS and ordered Teguh Samudera (the other vessel was already in the respondent's possession) to be delivered to the respondent within 21 days. Although the contract between NGV Tech and the respondent did not expressly stipulate when and how title in the vessels was to pass from NGV Tech to the respondent, it provided for how and when delivery to, and acceptance by, the respondent was to be effected, namely, that when construction of the vessels had been completed, the respondent was to accept them vide a certificate of final acceptance which the parties had to execute after a series of complex sea trials on the vessels had been carried out. The instant appeal was against the High Court's decision.

Held, allowing the appeal, setting aside the decision of the High Court, allowing the prayers sought for in the OS and also granting an alternative prayer that the respondent pay RM35,597,878.08 to Maybank in order to discharge the charge on the two vessels:

(1) Title in the two vessels did not pass to the respondent progressively. Instead, the title would have only passed upon delivery and acceptance as expressly provided for in the contract. The title to the vessels remained at all times with NGV Tech and it followed that Maybank, which was the chargee under the debentures which crystallised into a first fixed charge, was entitled through its receiver and manager to deal with or dispose of the two vessels (see paras 60–61).

(2) On the facts of the instant case, where there was no express provision in the contract stating when title was to pass, s 23 of the SOGA set out the rule to be applied. It required that the vessels were 'in a deliverable state' to be 'unconditionally appropriated to the contract' either by the seller with the assent of the buyer or vice versa. To be in a deliverable state, the vessels had to be physically completed such that it complied with the delivery requirements in the shipbuilding contract. The vessels in our case could not be said to have been in a deliverable state. The fact that one of the vessels was towed to the respondent's premises did not mean the vessels were in a deliverable state or that delivery had been effected. There also could not have been 'appropriation to the contract' because there was no compliance with the clauses specifying how delivery and acceptance was to be effected. The sea trials and the certificate of final acceptance were not completed. In these circumstances, it could not be said that s 23 had been complied with (see paras 51–52 & 58–59).

(3) The reliance of the High Court on s 19(1) of the SOGA was erroneous. Section 19 specifically dealt with the sale of specific or ascertained goods. In the present case, the shipbuilding contract was a sale of future or unascertained goods. This was because the contract was executed for the construction of the two vessels which were not 'ascertained' or determinable or specific at the time. Accordingly, the correct test or rule to ascertain whether or when title passed from NGV Tech to the respondent was governed by s 23 of the SOGA which provided that where there was a contract for the sale of future goods by description, as was the case here, the property in them did not pass until the goods were in a deliverable state and were appropriated to the contract either by the seller or the buyer with the consent of the opposing party (see paras 33, 36–37).

(4) While the existence of a provision for payment by instalments coupled with actual payment and a continuous assessment or inspection of the vessels might be relevant to ascertain the intention of the parties, it was inconclusive in itself, more so when there were express clauses in the contract denoting when and how delivery and acceptance was to be performed (see para 58).

[Bahasa Malaysia summary

Responden telah memasuki kontrak dengan perayu pertama ('NGV Tech') pembina kapal untuk membeli dua kapal latihan yang ditempah khas untuk Tentera Laut Diraja Malaysia. Responden telah mengawal ketat pembinaan kapal-kapal tersebut dan membayar bayaran progresif menurut pelbagai peringkat pembinaan itu siap. Bagi membiayai perniagaannya, NGV Tech telah mengambil pinjaman daripada perayu kedua ('Maybank'). Sebagai jaminan untuk pinjaman tersebut, NGV Tech telah memasukkan gadaian tetap dan terapung ke atas semua aset-asetnya menyebelahi Maybank di bawah beberapa debentur. Gadaian terapung menjadi kenyataan apabila petisyen penggulungan dikemukakan terhadap NGV Tech. Maybank telah melantik penerima dan pengurus untuk NGV Tech di bawah debentur dan bersedia untuk terus membiayai dua kapal itu sehingga siap jika responden membuat konsesi tertentu. Walau bagaimanapun, oleh kerana tiada maklum balas daripada responden, semua kerja atas kapal itu terhenti. NGV Tech akhirnya digulungkan di mana responden telah menamatkan kontraknya dengan syarikat itu pada masa responden telahpun membayar RM249.9 juta secara bayaran berperingkat daripada keseluruhan jumlah kontrak RM249 juta. Apabila responden memohon untuk memindahkan salah satu daripada dua kapal itu ('Teguh Samudera') daripada limbungan NGV Tech ke premisnya untuk disimpan dengan selamat, Maybank membantah terhadap pengalihan itu dengan mengatakan NGV Tech masih memiliki dua kapal tersebut tertakluk kepada gadaian tetap Maybank ke atas kapal-kapal tersebut. Jalan buntu dalam pertikaian berhubung isu tersebut antara pihak-pihak membawa

kepada perayu-perayu memfailkan saman pemula ('SP') di Mahkamah Tinggi untuk perintah bahawa NGV Tech masih pemilik sah dua kapal tersebut; bahawa pada setiap masa matan kapal-kapal tersebut digadaikan kepada Maybank dan bahawa Maybank dan/atau penerima dan pengurus NGV Tech mempunyai hak untuk mengurus dan/atau melupuskan kapal-kapal itu. Perayu-perayu menegaskan bahawa pilihan lain responden hanyalah untuk menyaman NGV Tech untuk ganti rugi sebagai pemiutang tidak bercagar. Responden, sebaliknya, berhujah bahawa hartanah dan hak milik ke atas kapal-kapal yang diserahkan kepadanya secara progresif menurut bayaran-bayaran berperingkat yang dibuatnya terhadap pembinaan mereka. Berdasarkan s 19(1) Akta Barangan Jualan 1957 ('ABJ'), Mahkamah Tinggi telah menolak SP itu dan memerintahkan Teguh Samudera (kapal lain yang telahpun dalam milikan responden) dihantar kepada responden dalam tempoh 21 hari. Walaupun kontrak antara NGV Tech dan responden tidak menyatakan dengan jelas bila dan bagaimana hak milik kapal-kapal itu diserahkan daripada NGV Tech kepada responden, ia memperuntukkan bagaimana dan bila sedahan kepada, dan penerimaan oleh, responden perlu dibuat, iaitu, bahawa apabila pembinaan kapal-kapal itu telah siap, responden perlu menerimanya melalui perakuan penerimaan muktamad yang pihak-pihak perlu melaksanakan selepas satu siri ujian laut yang kompleks ke atas kapal telah dijalankan. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi itu.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi, membenarkan permohonan yang dipohon dalam SP dan juga memberikan permohonan alternatif agar responden membayar RM35,597,878.08 kepada Maybank bagi tujuan melepaskan gadaian ke atas dua kapal tersebut:

(1) Hak milik ke atas dua kapal tersebut tidak diserahkan kepada responden secara berperingkat. Sebaliknya, hak milik itu hanya diserahkan selepas penghantaran dan penerimaan sepertimana diperuntukkan dengan jelas dalam kontrak. Hak milik kepada kapal-kapal itu masih pada setiap masa matan dengan NGV Tech dan ia diikuti bahawa Maybank, yang merupakan pemegang gadaian di bawah debentur yang menjadi kenyataan kepada gadaian tetap pertama, adalah berhak melalui penerima dan pengurusnya untuk berurusan dengan atau melupuskan dua kapal tersebut (lihat perenggan 60–61).

(2) Berdasarkan fakta kes ini, di mana tiada peruntukan nyata dalam kontrak yang menyatakan bila hak milik itu diserahkan, s 23 AJB menetapkan rukun yang terpakai. Ia menghendaki kapal-kapal tersebut 'in a deliverable state' agar 'unconditionally appropriated to the contract' sama ada oleh penjual dengan persetujuan pembeli atau sebaliknya. Untuk berada dalam keadaan yang boleh dihantar, kapal-kapal itu perlu siap secara fizikal yang mana ia mematuhi keperluan penghantaran dalam

kontrak pembinaan kapal. Kapal-kapal dalam kes ini tidak boleh dikatakan berada dalam keadaan yang boleh dihantar. Fakta bahawa salah satu daripada kapal itu telah ditunda ke premis responden tidak bererti kapal-kapal itu dalam keadaan yang boleh dihantar atau bahawa penghantaran boleh dibuat. Perbicaraan laut dan perakuan penerimaan muktamad tidak lengkap. Dalam keadaan ini, ia tidak boleh dikatakan bahawa s 23 telah dipatuhi (lihat perenggan 51–52 & 58–59).

(3) Kebergantungan Mahkamah Tinggi pada s 19(1) AJB adalah salah. Seksyen 19 secara khusus berbincang tentang jualan barangan spesifik atau yang telah dipastikan. Dalam kes ini, kontrak pembinaan kapal adalah jualan barangan masa hadapan atau tidak dipastikan, Ini adalah kerana kontrak itu telah dilaksanakan untuk pembinaan dua kapal yang tidak 'ascertained' atau boleh ditentukan atau spesifik pada masa itu. Sewajarnya, ujian atau peraturan yang wajar untuk memastikan sama ada atau bila hak milik diserahkan daripada NGV Tech kepada responden adalah dikawal oleh s 23 AJB yang memperuntukkan bahawa di mana terdapat kontrak untuk jualan barangan masa hadapan melalui penghuraian, sepertimana dalam kes ini, hartanah tersebut tidak diserahkan sehingga barangan itu dalam keadaan yang boleh dihantar dan bersesuaian dengan kontrak sama ada oleh penjual atau pembeli dengan persetujuan pihak yang membantah (lihat perenggan 33, 36–37).

(4) Apabila kewujudan peruntukan untuk bayaran secara ansuran digabunkan dengan bayaran sebenar dan penilaian atau pemeriksaan berterusan ke atas kapal-kapal itu mungkin relevan bagi memastikan niat pihak-pihak, ia tidak boleh disimpulkan dengan sendiri, lebih lagi apabila terdapat fasal-fasal nyata dalam kontrak menandakan bila dan bagaimana penghantaran dan penerimaan perlu dilaksanakan (lihat perenggan 58).]

Notes

For a case on sale of future goods by description, see 11(1) *Mallal's Digest* (5th Ed, 2015) para 875.

Cases referred to

Borneo Helicopters Sdn Bhd & Ors v Sabah Air Aviation Sdn Bhd (formerly known as Penerbangan Sabah Sdn Bhd) [2015] 1 MLJ 656; [2014] 1 LNS 1897, CA (refd)

Hyundai Heavy Industries Co Ltd v Papadopoulos and others [1980] 2 All ER 29, HL (refd)

Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 3 All ER 352, HL (refd)

Re Blyth Shipbuilding and Dry Docks Co Ltd; Forster and others v Blyth

Shipbuilding and Dry Docks Co, Ltd [1926] All ER Rep 373; [1926] Ch 494, CA (distd)
Reid v Macbeth & Gray [1904] AC 223, HL (folld)
Seath & Co v Moore (1886) 11 App Cas 350, HL (distd)
Sir James Laing & Sons, Limited v Barclay, Curle & Co, Limited [1908] AC 35; 1907 SC (HL) 1, HL (folld)
Stocznia Gdanska SA v Latvian Shipping Co and others [1998] 1 All ER 883; [1998] 1 Lloyd's Rep 609, HL (refd)

Legislation referred to

Mercantile Law Amendment Act 1856 [UK]
Sale of Goods Act 1893 [UK]
Sale of Goods Act 1957 ss 2, 18, 19, 19(1), 23

Appeal from: Writ Summons No 22NCC-83–02 of 2015 (High Court, Kuala Lumpur)

Yoong Sin Min (Chan Kok Keong and Winnou Chung with her) (Shook Lin & Bok) for the appellants.
Alice Loke Yee Ching (Nurul Ainy bt Yahya with her) (Federal Counsel, Attorney General's Chambers) for the respondent.

Nallini Pathmanathan JCA:

INTRODUCTION

[1] This is our decision in relation to the appeal against the decision of the High Court in Kuala Lumpur dismissing the appellants' originating summons seeking the following reliefs:

(a) that the first appellant ('NGV Tech') is the rightful owner of two vessels namely the Gagah Samudera and Teguh Samudera pursuant to a shipbuilding contract entered into between NGV Tech and the respondent, Kerajaan Malaysia ('the respondent');

(b) that the vessels are, at all material times charged to the second appellant ('Maybank') by NGV Tech; and

(c) that Maybank as chargee of the vessels and/or Mr Duar Tuan Kiat as the receiver and manager ('the R&M') of NGV Tech are entitled to deal with and/or dispose of the vessels.

[2] The learned judge in the court below declined to grant these reliefs, and dismissed the appellants' originating summons. It was further ordered by the court that the vessel named Teguh Samudera be delivered to the respondent

within 21 days (notwithstanding the absence of any prayer for such relief). Gagah Samudera was already in the possession of the respondent. A

[3] The competing claims of the appellants and the respondent may be summarised as follows. B

[4] The appellants maintain that NGV Tech, the shipbuilder, is the owner of the vessels at all material times. As the owner, title and property remain with it, such that the respondent has no entitlement to the vessels. The respondent's claim, it is maintained, lies in damages against NGV Tech. NGV Tech has been wound up. In short if the appellants' contention is accepted, then the respondent enjoys a claim only as an unsecured creditor. C

[5] The respondent, on the other hand, maintains that property and title to the vessels passed progressively in accordance with progress payments made, as construction commenced and continued. If such contention is accepted, then it would follow that the respondent is entitled to such portions of the vessels in respect of which payment has been made, as title/property in the same would have passed to it during the course of construction progressively in tandem with the payments made by it. D E

[6] It is necessary to consider briefly the salient facts of the case which are set out comprehensively in the submissions of both the appellants and the respondent, and are not substantially in dispute. F

BRIEF FACTS

The very brief facts giving rise to these competing claims are as follows.

[7] Maybank financed the business of NGV Tech including the construction of the vessels to be sold to the respondent to the extent of RM884,330,000 between September 2004–May 2012, in the form of various credit facilities. To secure these facilities NGV Tech had created fixed and floating charges over all of its assets in favour of Maybank pursuant to several debentures. G H

[8] In February 2012, NGV Tech and the respondent entered into a contract for the sale and fitting out of the two vessels for the Royal Malaysian Navy in the sum of RM294m. Subsequently there was a supplemental agreement entered into by the parties where there was a revision made to the progress payment schedule. I

[9] The construction of the ship commenced and instalments were made as building progressed, all of which was closely supervised by the respondent. However sale and delivery of the vessels to the respondent was not completed and construction was delayed.

[10] On 14 March 2013 a winding up petition was presented against NGV Tech. On 20 March 2013 a notice of crystallisation of the floating charge was issued to NGV Tech by Maybank. As a consequence, the floating charge over the assets of NGV Tech, including the vessels, became a fixed charge as of 20 March 2013, in favour of Maybank.

[11] On 3 April 2013 due, inter alia, to the default in payments under the credit facilities Maybank appointed a receiver and manager of NGV Tech, pursuant to the rights and powers available to it under the debentures.

[12] Notwithstanding the appointment of a receiver and manager, Maybank continued to provide funding to NGV Tech to complete the vessels. This was undertaken pursuant to a meeting with MINDEF. Such funding was undertaken with a view to recovering all monies granted for such construction from the payment of the purchase price by the respondent for the vessels in due course.

[13] On 14 May 2013, NGV Tech was wound up. Maybank wrote to the respondent advising of new delivery dates and seeking confirmation that the respondent would waive all liquidated damages arising as a consequence of the delay in delivery of the vessels. However the respondent did not respond. This resulted in Maybank confirming as of October 2013 that it would no longer fund the completion of the vessels and all sub contracting work on the vessels would cease until receipt of confirmation from the respondent. There was some further correspondence but no confirmation was received from the respondent. As such all work ceased on the vessels with effect from 1 November 2013.

[14] The respondent terminated the shipbuilding contract on 27 January 2014 pursuant to cl 22, on the basis of the winding up of NGV Tech and the appointment of the R&M over NGV Tech. As at the termination date, the respondent had paid a sum of RM249.9m towards the building of the vessels. Under the terms of the contract, NGV Tech was further liable to pay LAD in the sum of RM46.6m resulting from the delay in delivery of the vessels.

[15] The dispute as to the ownership of the vessels arose when in June 2014, the respondent sought to have the vessel Teguh Samudera transferred from the NGV's Tech shipyard to Lumut for safekeeping and to prevent further deterioration. Maybank objected to such a transfer, maintaining that NGV

Tech retained title and ownership of the vessels, which in turn was subject to the fixed charge granted to Maybank by NGV Tech. A

[16] Despite attempts to resolve this matter amicably, no resolution was reached whereupon the appellants filed the originating summons seeking the court's assistance in relation to the relief sought. B

[17] The decision of the learned judge has been set out above and the attendant grounds of judgment set out comprehensively the reasons for Her Ladyship's decision. C

OUR DECISION

[18] To our minds the issue that is determinative of this appeal turns on whether property and title in the vessels passed from NGV Tech to the respondent, or remained with NGV Tech. D

[19] In order to determine this issue, it is necessary to consider the shipbuilding contract between NGV Tech and the respondent, with a view to ascertaining the intention of the parties in this regard. E

[20] The contract stipulates that the respondent was desirous of purchasing from NGV Tech two units of training vessels, which NGV Tech had agreed to so provide. A perusal of the contract as a whole discloses that NGV Tech was required to design, build to completion and deliver these vessels to the respondent, after several complex and comprehensive tests had been undertaken. F

[21] The relevant clauses governing the description of the contract include the recital to the contract as well as cl 3.1 of the same. The said clause provides that NGV Tech is to sell, supply and deliver to the respondent the vessels as specified by the respondent. G

[22] Clause 6 provides for the provision of a performance bond by NGV Tech. There is further provision for renewal of this bond, if it is called upon during the course of construction. H

[23] Clauses 8.3 and 8.16.6 of the shipbuilding contract provide for how and when delivery and acceptance to the respondent is to be effected. The respondent is to accept the vessels vide a certificate of final acceptance, to be executed by the parties after a series of complex trials on the vessels. I

[24] It is not in dispute that these tests were not conducted and the certificate final aceptance was never executed. This is because the vessels were not completed.

[25] Other clauses of relevance include cl 13, which establishes a project team on behalf of the respondent for close monitoring of the implementation of the contract. In other words there was close supervision of the work undertaken as well as its progress, to ensure that it was in strict compliance with the building specifications stipulated by the respondent.

[26] It is to be noted however, that there is no express clause in the contract stipulating when and how title to the vessels is to pass from NGV Tech to the respondent. In the absence of such an express clause the parties put forward opposing contentions in law in relation to the passing of title, each claiming ownership of the vessels.

THE RESPONDENT'S SUBMISSIONS IN SUMMARY

[27] For the respondent it was contended both here and in the court below that upon a true construction of the shipbuilding agreement, parties had intended the title to the vessels to pass from NGV Tech to the respondent progressively, as and when payments were made towards construction.

[28] To support this contention, reliance is placed on the schedule to the contract, which sets out the progress payments to be made by the respondent upon completion of various stages of construction.

[29] Secondly, it is contended that shipbuilding contracts of this nature are not purely contracts for the sale of goods, but are more in the nature of a hybrid contract of construction as well as the sale of a ship (see *Hyundai Heavy Industries Co Ltd v Papadopoulos and others* [1980] 2 All ER 29 and *Stocznia Gdanska SA v Latvian Shipping Co and others* [1998] 1 All ER 883; [1998] 1 Lloyd's Rep 609, where it was held that the contracts in question were not simply one of sale, but which so far as the construction of the vessel was concerned, resembled a building contract). In short a hybrid of a construction contract and a contract for the sale of goods.

[30] Drawing an analogy with a building contract, it is contended for the respondent that in the event of a termination, the title to the property would pass to the purchaser of the property, as it had made progress payments towards the construction. In other words, that title had passed progressively in accordance with the various stages of payment as construction proceeded.

[31] The respondent also submitted that it did not make 'commercial sense' for the property in the vessels to pass only upon full payment of the vessels, because that would result in the respondent being exposed to considerable financial loss in the event of NGV Tech being wound up. As it is a commercial contract, it ought to be construed, it was contended, from a commercial viewpoint (see *Borneo Helicopters Sdn Bhd & Ors v Sabah Air Aviation Sdn Bhd (formerly known as Penerbangan Sabah Sdn Bhd)* [2015] 1 MLJ 656; [2014] 1 LNS 1897 and *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352).

THE APPLICATION OF SOGA AND ITS RELEVANT SECTIONS TO ASCERTAIN WHETHER AND WHEN TITLE PASSES

[32] However, it is not in dispute between the parties that the relevant applicable legislation is the Sale of Goods Act 1957 ('the SOGA'). The respondent contended, relying on *Re Blyth Shipbuilding and Dry Docks Co Ltd; Forster and others v Blyth Shipbuilding and Dry Docks Co, Ltd* [1926] All ER Rep 373; [1926] Ch 494 that the contract between NGV Tech and the respondent was, as stated in the case 'unquestionably a contract for the sale of future goods within the meaning of the Sale of Goods Act 1893'. The equivalent statute in Malaysia is the SOGA.

[33] The respondent sought to rely on s 19 of the SOGA. However s 19 of the SOGA specifically deals with the sale of specific or ascertained goods. In the present case, as stated in *Re Blyth*, the shipbuilding contract is in reality a sale of future or unascertained goods. This is because the contract was executed for the construction of the two vessels, which were not 'ascertained' or determinable or specific at the time.

[34] Therefore the relevant section that is applicable is s 18 of the SOGA which provides as follows:

> 18 Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

[35] More specifically, in order to ascertain the time at which title passes from the seller/shipbuilder, NGV Tech to the purchaser, the respondent, it is necessary to refer to s 23 of the SOGA which provides:

> 23(1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer.

> Such assent may be express or implied, and may be given either before or after the appropriation is made.

[36] To that extent the reliance of the learned judge on s 19(1) of the SOGA, premised on the submissions of the respondent is, in our view, erroneous. The correct 'test', as it were, or applicable rule to ascertain whether or when title passed from NGV Tech to the respondent is governed by s 2 of the SOGA.

[37] In essence it provides that where there is a contract for the sale of future goods by description, as is the case with the construction of the two vessels and their sale, the property does not pass until the goods are in a deliverable state and are appropriated to the contract, either by the seller or the buyer with the consent of the opposing party.

CASE LAW RELIED UPON BY THE RESPONDENT

[38] In support of its contention that property had passed to the respondent during the course of construction progressively, reliance was placed, inter alia, on the English cases of *Seath & Co v Moore* (1886) 11 App Cas 350 and *Re Blyth* (above).

[39] In the former case ie *Seath & Co v Moore*, the primary issue for determination was whether machinery to be fitted to a ship was considered to have become the property of the shipbuilders upon the bankruptcy of the manufacturers of the machinery. Reliance was placed on this comment by the House of Lords:

> The English cases to which I have referred appear to establish the principle that where it appears to be the intention, or in other words the agreement, of the parties to a contract for building a ship, that at a particular stage of its construction, the vessel so far as then finished shall be appropriated to the contract of sale, the property of the vessel as soon as it reached the stage of completion will pass to the purchaser.

[40] A reading of the case discloses that the appellant there, TB Seath & Co were shipbuilders. The respondent Moore was the trustee on the sequestrated estate of one A Campbell & Son who were engineers who had contracted with the shipbuilder, Seath & Co to supply engines, boilers and machinery required for the vessels built by them. The engineers, Campbell & Son were sequestered, resulting in the appointment of a trustee. The respondent refused to deliver machinery and material in relation to the several contracts between the parties whereupon the appellants filed an action for declaratory relief that they were the proprietors of the materials and other machinery lying in the bankrupt's premises. They failed to obtain these declarations, hence the appeal.

[41] It is pertinent that this case dealt with Scottish law, namely the Mercantile Law Amendment Act 1856, not the English Sale of Goods Act 1893. In commenting on the English decisions in relation to the passing of title or property, however, Lord Watson did say that where it appears to be the intention or agreement of the parties to a contract for the building of a vessel that at a particular stage of its construction the vessel so far as then finished is to be appropriated to the contract of sale, the property in the vessel as soon as it has reached that stage of completion passes to the purchaser and it then becomes his property, as does any other chattel affixed to the vessel. He went on to say that such an intention could be inferred, (in the absence of circumstances pointing to a different conclusion) from a provision in the contract to the effect that an installment shall be paid at a particular stage and such payment being made, coupled with regular inspection by the purchaser. In other words the vessel so far as constructed at the date of payment is appropriated to the contract. But he emphasised that English law required that in order to pass the property as sold, there had to be facts proven or admitted, sufficient to warrant the inference that the purchaser had agreed to accept the 'corpus' ie vessel as far as completed as amounting to part performance of the contract of sale.

A B C D

OUR VIEWS ON SEATH & CO V MOORE

E

[42] Notwithstanding the validity of the principle espoused by this case, it differs from the current case in that the express clauses of the shipbuilding contract here provide specific and express provisions as to when delivery and acceptance take place, as set out in cl 8. Such delivery and acceptance only ensue upon completion of the test trials and the execution of the certificate of final acceptance. These clauses in themselves amount to a 'circumstance pointing to a different conclusion' as stipulated in the case. The express intention of the parties, namely that delivery and acceptance takes place at a specified time, warrants the inference that until such time, the vessels (or goods) are not appropriated to the contract, as envisaged by s 23 of the SOGA.

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[43] Further, s 23 stipulates that the vessels have to be in a deliverable state when appropriated to the contract. It cannot be said that at the point in time when NGV Tech was wound up, or when an R&M was appointed prior to that, that the vessels were in a 'deliverable' state, ready to be appropriated to the contract either. In short the facts of the instant case do not warrant the inference that property or title passed progressively as and when a specific stage was reached and the requisite payment made. Such an inference may well have been plausible if there were no express clauses for delivery and acceptance as found in cl 8, or more pertinently if the parties had contracted specifically to that effect. In other words, if there had been an express clause specifying that property passed to the respondent progressively, there would be no question of NGV Tech, or consequently Maybank seeking title or ownership of the two vessels.

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[44] In the case of *Re Blyth* (as above), a shipbuilding contract provided for payment of the purchase price of the vessel by instalments. After two instalments had been paid and the vessel partly constructed, a receiver was appointed in an action commenced by debenture holders of the shipbuilding company. It was held in that case that although the ship had not been completed, the property in the uncompleted ship had passed to the purchasers.

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[45] However, it is evident from a perusal of the case that there was an express clause to the effect that upon the payment of the first monthly instalment, the vessel and all materials appropriated to the vessel shall become the absolute property of the purchaser, subject to the builder's lien.

[46] In the instant case, as we have noted, there is no such express clause specifying when title and ownership passes. Therefore this in itself distinguishes the fact pattern of our case completely, in relation to when title to the vessels passes. In the instant case, it is necessary, as stipulated at the outset, to determine whether on the given facts, the two vessels 'in a deliverable state were appropriated to the contract' as provided in s 23 of the SOGA.

[47] For the reasons cited above, we are of the considered view that the learned judicial judge erred in relying on these cases, particularly *Re Blyth* in concluding that property in the two vessels had passed to the respondent.

THE APPELLANTS' SUBMISSIONS

[48] The appellants essentially contended that the contract between the parties, being one of construction and sale warranted the construction that the shipbuilder, NGV Tech remained the rightful owner of the vessels at all material times. Reliance was placed on the recital, cll 3.1, 17.2.2 and cl 8.3 and 8.16.6, all of which we have referred to above. Particular reliance was placed on the clauses relating to the requirement for the final certificate of acceptance to be executed by both parties after a series of trials on the vessels, which supported their contention that property and ownership only passed at this juncture, and not before.

[49] The property remaining that of NGV Tech, Maybank was entitled to deal with/dispose of the vessels in view of the first fixed charge it enjoyed over the assets of NGV Tech, including the vessels.

[50] The appellants also relied on the textbook entitled *The Law of Shipbuilding Contracts* by Simon Curtis to support their proposition that upon

a perusal of the contract, it is apparent that title only passes upon delivery and acceptance of the two vessels.

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[51] It is clear to us that this is a case in which there is no express provision in the contract specifically or expressly stating when title is to pass. Most modern shipbuilding contracts have such an express clause. It is of importance to include such a specific and unambiguous clause so that parties are fully aware of their rights and entitlement under the shipbuilding contract. It is in fact of paramount importance to both the shipbuilder as well as the purchaser.

[52] The textbook by Simon Curtis prescribes that where there is no such express clause the court is required to construe the contract to establish the parties' intentions. Thereafter the application of the SOGA may be used in aid and supplement of the process of construction. On the facts of the instant case, unless a different intention appears in the contract, the provisions of s 23 set out the rule to be applied in a shipbuilding contract such as the instant one. As stated before it requires that the vessels 'in a deliverable state' to be 'unconditionally appropriated to the contract' either by the seller with the assent of the buyer or vice versa.

[53] The text further provides that goods are in a deliverable state only where the purchaser is contractually bound to take delivery. As such the presumption is that title to future goods passes upon their delivery to the purchaser.

[54] As such, we concur with the writer's view that: 'unconditional appropriation of future goods normally involves their physical delivery to the purchaser'. The setting aside of goods for use in the performance of the contract does not satisfy this requirement.

[55] The text further provides usefully:

> Thus in *Mucklow v Mangles* (1808) payment of the price and the painting of his name on the stern did not transfer title to the purchaser of a barge which had not been completed at the date of the shipbuilder's bankruptcy.
>
> Where, therefore, the contract makes no express provision as to the passing of title, the requirements of a deliverable state and an unconditional appropriation will normally dictate that this should occur only upon delivery and acceptance. The question then arises whether terms commonly found in shipbuilding contracts, in particular those providing for payment of the price by instalments and a right in the buyer to inspect and approve the works, alter this presumption.

[56] The writer then examines *Seath & Co v Moore* and concludes that Lord Watson ruled that a provision for the payment of instalments coupled

with actual payment and with inspection of the vessel, warranted such an inference, namely that title was to pass to the purchaser progressively.

[57] However in the later House of Lords decision in *Sir James Laing & Sons, Limited, v Barclay, Curle, & Co, Limited* [1908] AC 35; 1907 SC (HL) 1, payment of the price and inspection were held by the House of Lords to be no more than 'marks pointing to the property passing' and inconclusive as to the parties' intentions. A contract term providing that delivery of two new buildings should not be considered completed until they had passed sea trials accordingly passed title only after the trials had been satisfactorily concluded. A similar approach was taken in *Reid v Macbeth & Gray* [1904] AC 223, in which the shipbuilding contract was held to be for the sale of 'a complete ship'.

[58] We are persuaded by this exposition of the case law on the subject that the correct position in law is that while the fact of the existence of a provision for payment by installments, coupled with actual payment and a continuous assessment or inspection of the vessels may indeed be relevant to ascertain the intention of the parties, it is inconclusive in itself. More so, when there are express clauses in the contract denoting when and how delivery and acceptance is to be performed. Importantly, this conforms with the requirements of s 23 which envisage that the vessels in a 'deliverable' state are 'appropriated to the contract'. The vessels, to be in a deliverable state had to be physically completed, such that it complies with the delivery requirements in the shipbuilding contract. That was not the scenario in our case. The vessels cannot be said to have been in a deliverable state. The fact that one of the vessels was towed to the Respondent's premises does not mean that the vessels was in a deliverable state or that delivery had been effected.

[59] There could not have been appropriation to the contract because there was no compliance with the clauses specifying how delivery and acceptance was to be effected. The sea trials and the certificate of final acceptance were not completed. In these circumstances it cannot be said that s 23 was complied with.

[60] Given the foregoing we are satisfied that title did not pass to the purchaser, ie the respondent, progressively. Instead title would have only passed upon delivery and acceptance as expressly provided for in the contract. As such title to the vessels remained at all times with the shipbuilder, NGV Tech.

[61] It follows that as title remained and so remains with NGV Tech, the second appellant who is the chargee under debentures which crystallised into a first fixed charge in or around 20 March 2013, are entitled through their R&M to deal with or dispose of the two vessels.

[62] We therefore unanimously allow the appeal by the appellants and set aside the decision of the learned High Court judge. We grant an order in terms of the originating summons filed by the appellants, who were the plaintiffs in the court below. We also grant the following alternative prayer: Alternatively, as expressly sought/applied for the respondent pays the sum of RM35,597,878.08 to the second appellant, Maybank for the discharge of the vessels. On the issue of costs, RM20,000 is awarded here and below to the respondent subject to allocatur. The deposit is refunded.

Appeal allowed, decision of the High Court set aside, prayers sought for in the OS allowed and an alternative prayer that respondent pay RM35,597,878.08 to Maybank in order to discharge the charge on two vessels granted.

Reported by Ashok Kumar